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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 46

THE UNITED STATES, PETITIONER,

vs.

THE CAMBRIDGE LOAN & BUILDING COMPANY.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

RESPONDENT'S REPLY IN OPPOSITION TO PETITIONER'S MOTION TO REMAND, AND BRIEF IN SUPPORT THEREOF.

L. L. HAMBY,
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The Government's motion is to remand this case to the Court of Claims for the purpose of having found certain alleged additional facts set forth specifically in five separate paragraphs on pages three and four

of its motion, it being represented that these facts are material and necessary for a determination of the issue and that they were not found by the court below although it was requested to find them.

It is with great reluctance that we feel constrained to demonstrate the motion as a purely frivolous one for the reason that all of the alleged additional *facts* sought by the motion, with one wholly immaterial exception, have actually been found and are now before this Court. We cannot conceive any other purpose of the motion except to delay the final judicial determination of a case which is of the utmost importance to the building and loan associations of the State of Ohio and its millions of members against which the Internal Revenue Bureau has primarily leveled its interpretation of the exemption provisions of the Revenue Acts involved.

This case has been pending for four years and it will be seen from the record that after the judgment was entered by the Court of Claims the Government waited until the very last day to file a motion for a new trial. When this was overruled it waited until the very last day to file a petition to this Court for a writ of certiorari and although that was granted on April 2nd it has waited for six months to file this motion to remand, which, if granted, would send the entire case back to the Court of Claims and the question of vital importance both to the Government and to the public would be thus postponed for perhaps another year.

It is important to bear in mind that the attempt in this case, as in all other cases, is to assess retroactively for a period of five years taxes against these associations for which they had not been required to file any returns and during which under the Department's own regulations they had a right to suppose that they were exempt from this tax. To be now required to pay taxes for all of those back years after they have already paid all of their earnings in dividends to their members to aid them in the building of their own homes, which is the primary reason for their exemption by Congress, would require many of them to liquidate. More than this, all of the millions of members in the years past were required to pay income taxes on all dividends they received from building and loan associations because dividends are subject to the normal income tax if the corporation is exempt from taxation and therefore does not pay a normal tax at the source. It will be readily seen, therefore, that if these associations are now required retrospectively to pay these back taxes for ten years everyone of the millions of members who have paid the normal tax to the Government will automatically have paid a tax which was not due and which would, therefore, have been illegally collected; but they would now be powerless to recover from the Government a single dollar thereof because the statute of limitations has run against the filing of any claim for refund. This statute of limitations is daily running against hundreds and thousands of such potential claims if this Court should hold that building and loan associations of this character are subject to

the tax. It will thus be seen that it is of the greatest public importance that they have a judicial determination of the issues involved in this case at the earliest possible date.

Now let us demonstrate that the alleged additional findings sought by this motion have already been found by the Court of Claims and in most instances far more in detail than is contemplated by the motion.

We assume that before such a motion would be entertained it must be made to appear (1) that the additional findings requested are questions of fact which appeared competently in the evidence before the court below; (2) that such facts so competently appearing in the evidence were not found by the court below, although it was requested to do so; and (3) that such facts were relevant, material and competent to prove some issue in the case, and without which the issue involved could not properly be determined.

1. The Government contends that the Court of Claims should have found as an additional fact that the dividends paid on running or installment stock steadily decreased, while dividends on paid-up stock steadily increased.

In its finding VII (R., 9) the Court of Claims found as a fact (Item 1 of Liabilities) the amount of running stock and dividends for each of the years involved, showing that they decreased from $219,542.85 in the year 1918 to $152,964.34 in the year 1923, the amount for each year being separately stated. It also found (Item 5 of Liabilities) that the paid-up stock and dividends gradually increased from $45,755.06 in the

year 1918 to $181,248.64 in the year 1923, and the amount for each year intervening is separately stated. It seems, therefore, that whether such facts are relevant, material or competent, or whether they were supported by the evidence, they have been found and are now before this Court for whatever they may be worth.

The Government has failed to cite and cannot cite a single authority of any kind or character whereby a building and loan association may be restricted in the issuance of paid-up or installment stock within the limitation of its charter. The Court of Claims, in its Finding I (R., 8), found that during the years under consideration this association was authorized to issue capital stock not in excess of $1,500,000, and that the par value of each share was $50. The only limitation, therefore, was that at no time could there be outstanding more than $1,500,000 of stock subscribed for, and it makes no difference whether it was being paid for upon the installment plan by the week, by the month, or by the year, or whether it was paid for all at one time, or in any other manner.

2. The Government next contends for additional finding showing that deposits were accepted in large amounts by this association regardless of the borrowing needs of its members for the purpose of realizing pecuniary profit by lending such deposits to non-members. The Court of Claims, in its Finding VII (R., 9), has found (Item 6 of Liabilities) the outstanding deposits for each year under consideration other than deposits or other building and loan associa-

tions, and has also found that during only one year, being the year 1919 (Item 11 of Liabilities), it received deposits from other building and loan associations in the amount of $5,000. The Court of Claims has further found in its Finding VI (R., 9) that the money raised by this association during the years under consideration was principally from payments of stock, from *deposits* by nonmembers and from interest on moneys temporarily deposited by it in bank or loaned to building and loan associations, and the extent of all such transactions was reported to the Superintendent of Building and Loan Associations for the State of Ohio in annual reports. It thus appears that whether or not material, the alleged additional facts here sought have been found. It has also set out in Finding VIII (R., 10) the amount of all loans each year to nonmembers.

It is sufficient, however, to state that the Government is unable to cite a single authority of any kind or character to show that a building and loan association may not accept deposits except only where forbidden to do so by the law of the State or by its charter. Associations in about forty-four of the forty-eight States are permitted to accept deposits. Respondent, however, will be able to show in every case ever decided by a Federal court it is held that acceptance of deposits is clearly and necessarily within the purview of such associations. See Central Building, Loan & Savings Co. *vs.* Rowland, Collector, 216 Fed., 526, 532, 533, 534; Herold *vs.* Park View Building & Loan Association, 210 Fed., 577, 578, 582. See also

Sundheim on the Law of Building & Loan Associations, 2nd Ed., Sec. 9, page 25.

3. The next alleged additional finding which the Government desires is that this association was not concerned with the purpose of the borrower, and did not limit its loans to those to be used for building or acquiring homes, but that it made loans on houses, real estate, farms, business properties, churches, apartment houses, bank stock, industrial stock, municipal and other bonds. The request to have the Court of Claims find that this association was not concerned with the purpose of the borrower is a request for a conclusion to be drawn from facts and may not be required. However, let us see what the court has found. In its Finding III (R., 8), the court found that with the exception of an investment of $5,000 in hotel bonds afterwards disposed of, this association during the entire period under consideration invested its funds in the manner prescribed and permitted under the laws of the State of Ohio for the investment of funds of building and loan associations, reported them annually to the Superintendent of such associations in that State, and received a report each year from that Department upon the conduct of its business. That at least deals with the question of hotel bonds. Now, as to the loans made on farms, churches, business properties and the like, attention is invited to Finding VIII of the Court of Claims (R., 10). There, for each year under consideration, is set forth in detail the number of loans made to members and to nonmembers, the amount of the loans to each and

upon what it was secured, whether upon homes, real estate, farms, business property, churches, or collateral, including bank stock, industrial stock, municipal or otherwise. It seems that this requested finding, like the others, is absolutely frivolous. But, for whatever it may be worth, the facts are already before this Court. The manner in which the Government desires these facts found would be entirely misleading to this Court. It desires the facts found generally instead of specifically as the Court of Claims has already found them. For example, Finding VIII shows that one loan was made to a church in 1919 amounting to $7,500, one in 1920 amounting to $700, one in 1921 amounting to $15,500 and one in 1922 amounting to $5,000, whereas the aggregate amount of all loans made during the period under consideration was $2,200,000.

The Government has failed to cite any authority that holds that a building and loan association may not make a loan to a church or on a farm or on real estate or to acquire homes or for business purposes, but whatever may be the law the facts have been found in detail and these details should not be supplanted by a general finding which would be misleading. This is not the place to discuss the merits of this case.

4. The Government next moves for an alleged additional finding of fact to the effect that this association's loans to members were not confined to borrowers who subscribed to stock equal to the face of the loan, but that the association permitted persons to be

come members upon subscribing in some instances for from one to five shares of stock.

The Court of Claims, in its Finding IV (R., 8), found that under Section I of Article V of this association's constitution it was provided that anyone upon subscribing for or in any manner becoming entitled to or the owner of *any part* of the capital stock of this company shall be deemed a member thereof and a stockholder therein to the extent of the balance of his credits or record on account of said stock. Could anything be clearer than this? One share, or five shares, is a part of the capital stock. The record before this Court, therefore, shows that to become a member of this association it was only necessary to subscribe to some part of the capital stock. Whether a member desiring to borrow subscribes for a number of shares which at the face value would equal the amount of his loan is immaterial. The record shows this was not required, and that fact is before this Court and needs no further finding in regard thereto. If such deprive the association of its status as a domestic building and loan association the facts are there upon which to predicate such a conclusion.

As stated in the Government's motion, the Revenue Act of 1918 exempted from taxation "domestic building and loan associations," without conditions. That act was in force until November 23, 1921, and its language was identical with the Revenue Act of 1916 and the Revenue Act of 1913 in respect of the exemption of these associations. During all of that period no requirement had ever been laid down limiting exemp-

tion only to associations which require borrowing members to subscribe to stock in an amount equal to the amount of the loan desired. With that being the situation from 1913 until 1921, we find that when the bill proposing the Revenue Act of 1921 was presented in the Senate from the House of Representatives, it proposed to exempt the same domestic building and loan associations, but added one restriction by which thereafter exemption was limited to "domestic building and loan associations *substantially all of whose business is confined to making loans to its members.*" Since 1921 that has been the law. When this bill, however, was presented in this form to the Senate, a committee amendment was offered providing for the addition after the word "members" the following words: "on the basis of their stockholdings," so that the exemption paragraph relating to building and loan associations would read:

> "Domestic building and loan associations substantially all of whose business is confined to making loans to its members *on the basis of their stockholdings.*"

This proposed amendment adding the language in italics was rejected (Congressional Record, Vol. 61, pages 7649-7653) for the reason that it was not intended to legislate to produce such a result. Senator Willis of Ohio, speaking of the amendment, stated:

> "There are two very serious objections to that (the committee amendment). The first is that it will again throw the whole matter into litigation, because I do not think anybody can

> tell what the phrase 'loans to members on the basis of their stockholdings' means. Does it mean, if one man owns a $1 share and another owns a $5 share, that loans must be proportionate, or what does it mean? Inasmuch as the question has been threshed out, and inasmuch as the financial situation in Ohio, as elsewhere, is exceedingly delicate, as Senators must know, I suggest that it would be exceedingly unwise at this time to undertake to change a situation which is fraught with the very gravest dangers."

It will, therefore, be seen that what the Government is now contending for, even relating to acts prior to 1921, was actually presented to the United States Senate and definitely rejected. There can be no question, therefore, of the intention of Congress not to place any such requirement upon an association in order that it may be entitled to exemption. But if that be not sufficient your attention is invited to the case of Acklin *vs.* Peoples Savings Association, 293 Fed. 392, wherein the U. S. District Court for the Northern District of Ohio was called upon to interpret this identical paragraph of the Revenue Act of 1921 and the exact contention now being made in this motion by the Government. That court delivered its opinion August 23, 1923, and, with the clearest exposition of the intention of Congress, decided against the Government, holding that there was no vestige of authority under the 1921 Act, which is identical with all subsequent acts, for limiting the exemption of these associations to only such which require a member to

subscribe in stock at its par value to the full amount of a loan which he may happen to desire. It held that under the statute it was only required after the passage of the 1921 Act to confine its loans to members and that as Congress did not see fit to define or limit the classification of membership a member of such an association was one which complied with its constitution and by-laws within the charter and the law authorizing the association to do business.

5. Finally, the Government claims that it needs one more additional finding of fact and that is that the number of depositors in every one of the years under consideration exceeded the number of stockholders of the association, the difference being small in 1918, but twice as great in the other years. Let us apply the test to this.

The Court of Claims has found in its Finding VII (R. 9, Item 6 of Liabilities) the amount of deposits each year. What possible assistance it could be to the Government or to this Court to know whether these deposits were made by fifty or by seventy-five different individuals is beyond conception and no reason for it is given. In its Finding VIII (R. 10) the Court of Claims has set forth the number of members each year to whom loans were made. Of what aid is it to this Court to know how many other members there may have been during any particular year who did not borrow any money? What has either of these things to do with the fundamental principle involved in this case? Of what assistance would it be to this Court or to the

Government if the record showed, for example, that during one particular year the number of depositors was one hundred and the number of stockholders was seventy-five? What would one do with that information if he had it? It is axiomatic that a building and loan association could not possibly exist if it accepted deposits in an *amount* exceeding that which it loaned because instead of it being able to thrive and pay its members a dividend, it would operate at a loss. Whether, therefore, the *amount* of deposits were made by fifty people or by ninety people is wholly irrelevant and whether it loaned the money deposited to 100 different stockholders or 200 is likewise wholly irrelevant.

It should be borne in mind that the number of members or stockholders of a building and loan association not only differs from year to year and from month to month, but from day to day. Practically every day some member's shares mature and his loan becomes paid up and he no longer remains in the association as a member. The shares that he had may then be issued to someone else who desires to become a member. At the bottom of page fifteen of the Government's motion it is apparent that what it desires to have found and placed before this Court is the number of stockholders that happened to be such on December 31st, of each year, and the number of depositors that happened to be on the books of the association on the last day of the year. There is no evidence in the record in the court below, none was presented and none could ever be produced at this late date to show how many stockholders there actually were during each day of

each one of these particular years. The depositors remain fairly constant throughout the year except that one may withdraw his deposit at any time; but the number of stockholders on the last day of the year would only represent the number on that day. There were, therefore, 364 other days in each one of these years and the number of stockholders on each one of those 364 days in each one of the years concerned was different from what it was on the last day. Doubtless if all of the stockholders on each day throughout the year were totaled, they would be far in excess of the number of depositors; but what difference would that make and of what assistance would that be to this Court? We submit that it would serve no other purpose than to clog the record.

Even if the alleged additional facts sought by this motion had not actually been found by the Court of Claims we would unhesitatingly consent that this Court may deem to have been found every single *fact* sought by this motion if it would not necessitate the remanding of this case to the Court of Claims, thus resulting in the necessity for another petition for a writ of certiorari being filed and the postponement of decision by this Court for perhaps another year. In so far as the respondent is concerned this Court is at liberty, if it deem it to be material and necessary for its determination, to consider as having been found by the court below every single *fact* covered in the motion if it has not already been competently found by the Court

of Claims; but it is respectfully submitted that there is no merit to the motion for the reasons stated and the same should be denied.

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